IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex re W.A. DREW EDMONDSON in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, ET AL. Plaintiffs, vs. TYSON FOODS, INC., ET AL. Defendants, vs. CARGILL TURKEY PRODUCTION, LLC, ET AL., Third Party Plaintiffs, vs. CITY OF WESTVILLE, ET AL. Third Party Defendants, and TYSON FOODS, INC., ET AL., Third Party Plaintiffs, vs. CITY OF TAHLEQUAH, ET AL., Third Party Defendants.	Case No. 05-CV-0329-TCK-SAJ

COBB-VANTRESS, INC.'S RESPONSE TO STATE OF OKLAHOMA'S MOTION TO COMPEL RESPONSES TO ITS MAY 30, 2006 SET OF REQUESTS FOR PRODUCTION AND BRIEF IN SUPPORT

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Cobb-Vantress, Inc. ("Cobb"), for its response to Plaintiff's Motion to Compel Cobb-Vantress, Inc. to Respond to its May 30, 2006 Set of Requests for Production ("Motion to Compel"), states as follows:

I. INTRODUCTION

Plaintiff has propounded discovery requests which do not meet the requirements of Federal Rule of Civil Procedure 26, as the requests are overly broad and unduly burdensome and seek the production of documents and materials which are not relevant to the instant action. Plaintiff has requested that Cobb produce, without limitation, 1) all documents and materials made available for inspection and copying by Cobb to the plaintiffs in *City of Tulsa v. Tyson Foods, Inc.*, No. 01-CV-0900 ("*City of Tulsa*"); 2) all privilege logs produced by Cobb to the plaintiffs in *City of Tulsa*; 3) copies of all written discovery responses made by Cobb to the plaintiffs in *City of Tulsa*; 4) copies of all transcripts of depositions of Cobb employees or persons under contract with Cobb taken in *City of Tulsa*; 5) copies of all transcripts of depositions of experts retained by Cobb taken in *City of Tulsa*; 6) all documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in *City of Tulsa*; and 7) copies of joint defense agreements to which Cobb is a party that pertain to the current lawsuit. *See* Objections and Responses of Cobb-Vantress, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production, attached as Ex. A to Pls. Motion to Compel (Dkt. No. 898).

Cobb objected to Request for Production Nos. 1 - 6 on the basis that they seek information, documents, and materials which will not lead to the discovery of evidence admissible in the present action. Cobb further objected to Request for Production Nos. 1 and 3 – 6 because they are overly broad and unduly burdensome. Cobb objected to Request for Production No. 7 on the basis of privilege. Plaintiff has now filed its Motion to Compel,

asserting that not only is the information it seeks in its Requests for Production relevant to the present action, but also that Cobb's objections to the discovery requests are insufficient. Based on the fact that the present lawsuit and *City of Tulsa* are entirely different cases, and in fact, focus on very different geographical areas, and on the fact that the documents requested by Plaintiff encompass tens of thousands of pages, it is clear that Plaintiff is engaged in a fishing expedition and that this Court should deny Plaintiff's Motion to Compel.

At a meet and confer session involving Plaintiff's counsel and counsel for the Poultry Integrator Defendants, Cobb's counsel informed Plaintiff that it would be willing to respond to Plaintiff's requests for production if Plaintiff made a reasonable effort to more specifically identify the documents and topics from *City of Tulsa* which Plaintiff believes are relevant to the instant lawsuit. Although Plaintiff's counsel admitted that they prepared a list of issues relating to *City of Tulsa* which Plaintiff believes are relevant in the current action, Plaintiff's counsel refused to undertake any effort to narrow its discovery requests.[1] Plaintiff insists that Cobb review its entire *City of Tulsa* case file to determine which documents are relevant to the instant action and produce such documents. Counsel for Cobb conveyed its belief that such a response is improper under the Federal Rules of Civil Procedure.

Under the discovery standards set forth in Federal Rule 26, Plaintiff, as the party seeking discovery, must establish that the documents and materials which it seeks from *City of Tulsa*, as well as any joint defense agreement pertaining to the current action, have some level of evidentiary value in the present action. Plaintiff's May 30, 2006 Set of Requests for Production do not satisfy this standard. Thus, this Court should deny Plaintiff's Motion to Compel.

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[1] Plaintiff's counsel refused to provide Cobb's counsel with the list of relevant issues relating to *City of Tulsa*, which Plaintiff's counsel assert guides their discovery efforts in this action.

II. ARGUMENT AND LEGAL AUTHORITY

A. This Court Should Not Permit Plaintiff to Engage in a Fishing Expedition With Respect to Documents Pertaining to Prior Litigation.

The Federal Rules of Civil Procedure afford litigants the opportunity, through various discovery devices, to conduct reasonable and necessary discovery. However, the right to conduct discovery is subject to certain limitations. Generally, parties to a lawsuit are not at liberty to use discovery devices to annoy, harass, or oppress a party or to impose upon a party the undue expense and inconvenience of responding to frivolous discovery requests. FED.R.CIV.P. 26(c). Courts have recognized that a party may not use discovery "merely to vex or harass litigants." *Keenan v. Texas Production Co.*, 84 F.2d 826, 828 (10th Cir. 1936). To ensure that parties do not disregard this provision of the Federal Rules of Civil Procedure, the federal courts have inherent discretion to deny discovery when it is apparent that the party seeking the discovery has no good faith basis to support the discovery request and instead engages in a "fishing expedition." *See, e.g., Koch v. Koch Indust., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000) ("Plaintiffs' mere hope that they might find something on which to base a claim . . . . [constituted] a fishing expedition" which the trial court had the inherent power to deny); *see also Keenan*, 84 F.2d at 828 (discovery "cannot be utilized for a mere fishing expedition, nor for impertinent intrusion"); *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) ("the district court . . . is not 'required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim'") (citing *McGee v. Hayes*, 43 Fed.Appx. 214, 217 (10th Cir. 2002)). It is well settled that "[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery." *Martinez*, 229 F.R.D. at 218 (citing *Zenith Electronics Corp. v. Exzec*, Inc., 1998 WL 9181, at *2 (N.D.Ill. 1998)). Because Plaintiff refused to limit the

scope of its discovery requests, it has violated Rule 26's prohibition of annoying, harassing, oppressive, and unduly burdensome discovery requests and is engaged in an impermissible fishing expedition.

Plaintiff's discovery requests constitute improper use of discovery devices. This Court should not require Cobb to produce a massive collection of documents from prior litigation, which focused on operations within a different watershed, based on mere speculation and conjecture that the discovery requests may result in the production of a few relevant documents.

B. The Information and Documents From Prior Litigation Which Plaintiff Requests Are Not Relevant, and Thus, Are Not Discoverable.

Plaintiff's May 30, 2006 discovery requests seek documents which are irrelevant to the claims and defenses of the parties in this lawsuit. Plaintiff's Requests for Production encompass the following clearly irrelevant documents:

- Nutrient Management Plans for hundreds of poultry growers with operations located in the Eucha/Spavinaw ("E/S") Watershed;
- Contract and various addenda for hundreds of E/S poultry growers;
- Flock settlement printouts for hundreds of E/S poultry growers;
- Vaccination and mortality records for hundreds of E/S poultry growers;
- Poultry house time and temperature records for hundreds of E/S poultry growers;
- Propane purchase records for hundreds of E/S poultry growers;
- Flock inspection reports for hundreds of E/S poultry growers;
- Grower files for hundreds of E/S poultry growers;
- Depositions of dozens of E/S poultry growers;
- Logs of privileged and confidential documents responsive to discovery requests in *City of Tulsa*;[2]

[2] In the event that the Court compels Cobb to produce *City of Tulsa* documents in this action, and such production includes privileged documents, Cobb will include such documents

- Reports, depositions, and files of at least eight experts covering irrelevant topics such as Tulsa's wastewater treatment lagoons at Lake Eucha; Tulsa's management of Lake Eucha and Spavinaw; Tulsa's potable water treatment technologies and plants; water quality of streams, groundwater, and reservoirs in the E/S Watershed; impacts of third parties identified in the E/S Watershed; criticisms of the plaintiffs' experts' principles and methodologies; modeling of hydrology and reservoirs in the E/S Watershed; analysis of Tulsa's claimed taste and odor complaints; maintenance of Tulsa's water distribution system;[3] and

- Documents pulled from Tulsa's files relating to the watershed, the lagoons, taste and odor, and water treatment.

Rule 26 establishes the scope of discovery, which states that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." FED.R.CIV.P. 26(b)(1). Further, "the object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue." *Martinez*, 220 F.R.D. at 218 (citing *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D. Ill. 1998)). "[W]hen the request is overly broad on its face or when relevancy is not readily apparent, the party seeking the discovery has the burden to show the relevancy of the request." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D.Kan. 2004). Plaintiff has failed to meet this burden regarding relevance. Plaintiff's discovery requests are clearly overly

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on its privilege logs in this action. Thus, production of privilege logs from *City of Tulsa* will be duplicative. Additionally, if this Court narrows the scope of production required by Plaintiff's discovery requests, production of privilege logs from *City of Tulsa* would be improper because of the resulting disclosure of the existence of privileged, non-responsive documents from *City of Tulsa*. Therefore, this Court should deny Plaintiff's Motion to Compel with respect to Request for Production No. 2.

[3] The work product of experts from *City of Tulsa* bears no relevance to this present action. Cobb has not designated any of the same experts to testify for it in the current action; therefore, Plaintiff cannot use any expert reports and materials even for impeachment in this litigation. In the event that Cobb designates any of its *City of Tulsa* experts as experts in this litigation, Plaintiff may again issue Requests for Production related to the work of those experts.

broad on their face; further, it is not readily apparent that any significant portion of the documents requested is relevant to the claims and defenses presented in the present action.

Based upon Cobb's description of the documents and materials encompassed by Plaintiff's discovery requests and recognition of the fact that those documents and materials are irrelevant to the issues in the current action, Plaintiff's motion to compel production of documents and materials pertaining to all issues of *City of Tulsa* has no basis in Rule 26. Rather than requiring Cobb to sort through its entire *City of Tulsa* file in an effort to determine which documents included in the scope of Plaintiff's discovery requests are relevant to the present action, Plaintiff should bear the burden of constructing discovery requests which reasonably define and tailor the scope of documents sought.

As support for its proposition that its May 30, 2006 discovery requests seek information which is relevant to this action, Plaintiff cites two products liability cases in which courts permitted discovery into prior litigation concerning the same product. In *Snowden v. Connaught Labs, Inc.*, 137 F.R.D. 325 (D.Kan. 1991), the court found that *"[i]n the context of this case,* where the research, testing and manufacture of DPT vaccine took many years, it is possible that information which could be distilled from lawsuits instituted as long as twelve years ago, could prove highly relevant to issues in the instant case." *Snowden*, 137 F.R.D. at 330 (emphasis added). It is important to note that *Snowden* recognizes that a court should not permit discovery to proceed unfettered and states as follows:

> Although relevance in the context of discovery is decidedly broader than in the context of admissible evidence, it is not without limits. Parties to a lawsuit are only entitled to discover information that 'appears reasonably calculated to lead to the discovery of admissible evidence.'

Snowden, 137 F.R.D. at 329 (citing *Payne v. Howard*, 75 F.R.D. 465 (D.C.D.C. 1977)). Plaintiff further relies on *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 497 (D. Md. 2000),

which found that because the same defect was alleged in *Tucker* as was alleged in a case brought previously against the defendant, documents from the previous litigation were relevant.

The reasoning set forth in *Snowden* and *Tucker* is not applicable in the present action. The instant case is not a products liability case, but rather environmental litigation in which Plaintiff alleges harm to specific waters as a result of operations and activities occurring within the specifically defined area of the Illinois River Watershed ("IRW"). The present action and *City of Tulsa* involve significant differences. While both cases involve claims regarding the environmental impact of the land application of poultry litter on water bodies, the cases involve different water bodies and different poultry farms located in two geographically distinct and separate watersheds. Plaintiff in this action is suing because of the alleged impairment of the IRW. *City of Tulsa*, from which Plaintiff seeks the production of documents, focused on impairment of the E/S Watershed. Because activities that occur within one watershed cannot affect water bodies in another watershed, the alleged impairment of the IRW can only result from activities that occur within the IRW. It is clear that (1) information relating to the ownership, operations, and finances of poultry growers in the E/S Watershed; (2) information regarding how Tulsa managed its reservoirs, water treatment plants, lagoons, and distribution system; (3) information regarding the E/S Watershed with respect to terrain, hydrology, reservoirs, point sources, third-party operations, alleged injuries; and (4) expert evaluation of such information and the principles and methodologies employed by Tulsa's experts simply has no evidentiary value in this present action. The information that Plaintiff seeks from *City of Tulsa* is not relevant to claims and defenses presented in the present action because all information and testimony from *City of Tulsa* is specific to the E/S Watershed and its geography. Clearly, Plaintiff's discovery requests are so broad that a majority of the documents and materials

included within their scope are irrelevant. Therefore, this Court should deny the Motion to Compel.

The fact that this litigation is not related to *City of Tulsa* is evident from the Order of this Court dated April 13, 2006. (Dkt No. 381). This Order related to Defendants' Objection to Plaintiffs' Designation of Complaint as "Related Case." (Dkt No. 53). Defendants' Objection identified significant differences between the present litigation and *City of Tulsa*. Although this Court did not grant Defendants' Objection, this Court classified the Objection as moot because "The Honorable Claire V. Eagan has declined transfer of the instance case as related to Case No. 01-CV-900." *See* April 13, 2006 Order (Dkt No. 381). The Court stated that "Plaintiffs shall STRIKE THE REFERENCE on all future pleadings." *Id.* This Court's holding leads to a logical inference that the present litigation is not related to *City of Tulsa*. Therefore, this Court has already determined the issue of whether information and materials from *City of Tulsa* are relevant to this action. This Court should hold Plaintiff to this previous finding.

Additionally, although as Plaintiff contends, "[b]oth cases are actions for pollution by poultry integrators of a watershed area" (Plaintiff's "Motion to Compel," p. 3), the scope of the present action is much broader than the scope of *City of Tulsa*. *City of Tulsa* involved one issue: the alleged contamination of drinking water by the single constituent of orthophosphate. The present action seeks compensation for contamination, including destruction of aesthetic aspects, of various water bodies, including both rivers and lakes located within the IRW, by multiple constituents. As opposed to the basis of the *Tucker* decision, the defect alleged in *City of Tulsa*, the effect of orthophosphate on drinking water, is not the same as the defect alleged in the present action, which is the effect of phosphorus compounds, nitrogen compounds, arsenic, copper, zinc, hormones, and microbial pathogens on the IRW as a whole and on the many uses of

the water bodies located within the IRW. *See generally* Pls. First Am. Compl. (Dkt. No. 18). Any information contained within the documents requested by Plaintiff in its May 30, 2006 discovery requests will focus specifically on the E/S Watershed, rather than providing information relevant to the IRW.

Further, because the present action has a broader focus than *City of Tulsa*, the requested information will not reduce the amount of discovery necessary in this action. One key factor in the *Snowden* holding was that production of the information sought "could save the time and expense of duplicating discovery aimed at the same issues and materials already produced in prior litigation." *Snowden*, 137 F.R.D. at 330. Plaintiff has shown that this action will require copious amounts of discovery whether or not this Court requires Cobb to produce information from *City of Tulsa*, which is not relevant to this case focusing on the IRW. Plaintiff has already issued over 500 discovery requests to Cobb and its affiliated entities. Plainly, production of the documents and information that Plaintiff seeks will not reduce the amount of discovery required in the present action.

Finally, *Snowden* does not apply to the discovery dispute at hand because *Snowden* applies a prior version of Rule 26. *Snowden*, 137 F.R.D. 325 (D.Kan. 1991). Since the time of the *Snowden* decision in 1991, the scope of relevant discovery under Rule 26 was narrowed to permit only discovery that is "relevant to a claim or defense." FED.R.CIV.P. 26(b)(1). Plaintiff improperly seeks to have the older version of Rule 26, which the *Snowden* court applied and which allows discovery "if there is any possibility that the information sought may be relevant to the subject matter of the action," applied here. *See Snowden*, 137 F.R.D. at 329 (citing *Renshaw v. Ravert*, 82 F.R.D. 361, 363 (E.D.Pa. 1979)).

Rule 26 was amended in 2000, and since that time, courts have recognized that the scope of relevant discovery has been narrowed "from 'subject matter' of the action to 'claim or defense of any party.'" *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717, at *2 (S.D.N.Y. 2002) (citing FED.R.CIV.P. 26(b)(1) Advisory Committee's Note to the 2000 Amendment); *see also Martinez*, 229 F.R.D. at 218 (citing Advisory Committee's Notes to the 2000 Amendment which state that "the amendment was made with the intent 'that the parties and the court focus on the actual claims and defenses involved in the action.'"). In *Johnson Matthey*, the court denied a motion to compel similar to that at issue here because the discovery requests concerned matters that were "in no way relevant to a claim or defense at issue." *Johnson Matthey*, 2002 WL 31235717, at *2. Similarly, because Plaintiff's requests for production include within their scope documents and materials from *City of Tulsa* that are in no way relevant to the claims and defenses at issue in this action, this Court should deny Plaintiff's Motion to Compel as it exceeds the scope of discovery permitted under Rule 26.

In this response to Plaintiff's Motion to Compel, Cobb has met the burden imposed upon it to establish that Plaintiff's discovery requests encompass irrelevant documents and materials and thus are overly broad:

> When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.

Owens, 221 F.R.D. at 652; *see also St. Paul Reinsurance Company, Ltd. V. Commercial Financial Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000) (citing *Burke v. New York City Police Department*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987)). This response clearly shows that Plaintiff's discovery requests exceed the scope of relevance permitted by Rule 26, and that the burden

resulting to Cobb in producing the documents requested would substantially outweigh the benefit of any marginally relevant documents and materials contained within the documents requested. Cobb has satisfied its responsibilities set forth in *Owens*; the discovery requested by Plaintiff is overly broad, unduly burdensome, and seeks irrelevant documents. Thus, this Court should deny Plaintiff's Motion to Compel.

C. Plaintiff's Discovery Requests Are Overly Broad and Unduly Burdensome.

Under Rule 26(b)(2), a court may limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit . . . ." FED.R.CIV.P. 26(b)(2). As discussed above, the benefits resulting from production of the information and materials requested by Plaintiff are minimal, as such information and documents are not relevant to the issues at hand and will not reduce the amount of discovery required in this action. In contrast, the burden imposed upon Cobb in producing such information and materials would be great. Plaintiff requests, in essence, the production of Cobb's entire file from *City of Tulsa*. Discovery requests must meet the following standard, set forth in *Audiotext Communications v. U.S. Telecom, Inc.*:

> Requests should be reasonably specific, allowing the respondent to readily identify what is wanted. Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request. The court does not find that reasonable discovery contemplates that kind of wasteful effort. In this instance the court finds that most of these requests fail the test.

Audiotext Communications v. U.S. Telecom, Inc., 1995 WL 18759, at *1 (D. Kan. 1995).

Plaintiff's discovery requests clearly do not meet the *Audiotext* standard, in spite of Plaintiff's contention that its Requests for Production will "save all the parties involved time and money." Pls. Motion to Compel, p. 2. Because responding to Plaintiff's Requests for Production will

require Cobb to review its entire *City of Tulsa* file in order to locate relevant documents, such an assertion is unsound.

Upon recognition of the nature of the documents which Plaintiff's discovery requests encompass, it is clear that such requests will subject Cobb to the type of abusive discovery that is impermissible under *Audiotext* in the event that this Court grants Plaintiff's Motion to Compel. Additionally, Plaintiff's contention that all parties involved will save time and money because of Plaintiff's discovery requests is plainly unfounded. Aside from the sheer copiousness of the documents included in the scope of Plaintiff's discovery requests, the inclusion of irrelevant documents in the scope of such requests causes the requests to be overly broad and unduly burdensome.

D. Joint Defense Agreements Are Not Discoverable.

Plaintiff also seeks the production of copies of any joint defense agreement executed in the present lawsuit. Cobb objected to this request on the basis of the attorney work-product doctrine, attorney-client privilege and/or joint defense privilege, and common interest privilege. Plaintiff contends that it requires the production of copies of the joint defense agreement in order "to evaluate Cobb-Vantress's privilege claims in this litigation." Pls. Motion to Compel, p. 9. Plaintiff's contention is inadequate to show that any joint defense agreements entered into by Cobb in this action are discoverable under Rule 26.

It is well settled that the existence of any privilege asserted is a matter of law which this Court, exclusively, should determine and evaluate. *See, e.g.* Dick v. Truck Ins. Exch., 386 F.2d 145, 147 n.2 (10th Cir. 1967); *SCO Group, Inc. v. Novell, Inc.*, 377 F.Supp.2d 1145, 1152 (D.Utah 2005). "No written agreement is generally required to invoke the joint defense privilege." *United States v. Stepney*, 246 F.Supp.2d 1069, 1080 n.5 (N.D. Ca. 2003) (relying on *United States v. Weissman*, 195 F.3d 96, 98-99 (2d Cir. 1999)). However, a written joint defense

agreement does assist in determining whether "defendants are collaborating" and whether parties made communications "pursuant to a joint defense effort." Id. "Joint defense agreement are generally considered privileged." A.I. Credit Corp. v. Providence Washington Ins. Co., Inc., 1997 WL 231127 (S.D.N.Y. 1997). Because "defendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person," courts have found that "disclosure of the existence of [a joint defense] agreement would be an improper intrusion into the preparation of the defendant's case." United States v. Bicoastal Corporation, 1992 WL 693384 (N.D.N.Y. 1992) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989), *cert. denied*, 112 S.Ct. 55 (1991)).

The basis for finding that Cobb's joint defense agreement is privileged is the common interest doctrine. The common interest doctrine "extends the protection afforded by other doctrines, such as the attorney/client privilege and the work product rule." McNally Tunneling Corp. v. City of Evanston, 2001 WL 1246630, at *2 (N.D.Ill. 2001) (citing *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Ca. 1995)). The purpose of the common interest doctrine is to allow "persons who share a common interest in litigation . . . to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." United States v. Duke Energy Corp., 214 F.R.D. 383, 387 (M.D. N.C. 2003). Where, as here, Cobb shares a common interest with other defendants in this action and the joint defense agreement at issue contains both attorney-client communications and work product, a joint defense agreement is protected from disclosure to a party seeking production of such an agreement.

In order to claim the protection of the work-product doctrine through the common interest doctrine, Cobb must demonstrate that the joint defense agreement was prepared in anticipation of litigation and that disclosure of the joint defense agreement would reveal the mental processes of the attorneys for defendants sharing a common interest. *See* *McNally*, 2001 WL 1246630, at *4. Here, Cobb's joint defense agreements with other defendants in this action *were* prepared in anticipation of this litigation and contain information that if disclosed would reveal the thought processes, mental impressions, and litigation strategy of the attorneys involved in this action. The work-product doctrine, as extended by the common interest doctrine, protects Cobb's joint defense agreements in this action from disclosure. Cobb does recognize that the protection afforded by the work-product doctrine is a qualified privilege. In the event that the party seeking discovery establishes a substantial need for the information or documents sought or that it would be subjected to undue hardship in acquiring the information from another source, disclosure of the protected document may be justified. *McNally*, 2001 WL 1246630, at *4 (citing *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996); FED.R.CIV.P. 26(b)(3)). Plaintiff's sole justification for the disclosure of Cobb's joint defense agreements, that the "agreements, to the extent there are any, are necessary for the State to evaluate Cobb-Vantress's privilege claims in this litigation," falls well short of the substantial need or undue hardship standard set forth in Rule 26(b)(3). Plaintiff has not set forth facts which are sufficient to overcome the protection afforded by the work-product doctrine.

The attorney-client privilege protects from disclosure Cobb's joint defense agreements entered into in this action. *McNally* held that the attorney client privilege applies to protect a joint defense agreement "where (1) legal advice of any kind is sought, (2) from a professional legal advisor in her capacity as such, (3) the communications relating to that purpose, (4) made

in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except the protection be waived." *McNally*, 2001 WL 1246630, at *4 (citing Graham, Cleary & Graham's Handbook of Illinois Evidence, § 505.1 at 328 (7th ed. 1999)). Cobb's joint defense agreements satisfy these elements and therefore the attorney-client privilege, in conjunction with the common interest doctrine, protects such agreements from disclosure.

In an effort to support its contention that this Court should compel Cobb to produce joint defense agreements into which it has entered in this action, Plaintiff *cites* *Power Mosfet Techs. v. Siemens AG*, 206 F.R.D. 422 (E.D. Tex. 2000). As opposed to Cobb's joint defense agreements, the joint defense agreement at issue in *Power Mosfet* was found not to be work product on the basis that "[t]he agreement does nothing to reveal counsel's mental impressions or thought processes." *Power Mosfet*, 206 F.R.D. at 426 n.12. However, Cobb's joint defense agreements do contain work product which, if revealed to Plaintiff, would divulge the mental impressions and thought processes of counsel for Cobb, as well as the mental impressions and thought processes of counsel for the other defendants who are parties to the agreements. The *Power Mosfet* holding is not applicable here; this Court should find that the common interest doctrine, the attorney-client privilege, and the attorney work-product doctrine preclude disclosure of Cobb's joint defense agreements.

E. Plaintiff May Not Discover Confidential Documents Pertaining to the Implementation of the City of Tulsa Consent Decree.

Plaintiff, in Request No. 6, seeks the production of documents relating to "the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit." Cobb objected to Request No. 6 as vague and ambiguous as it is not clear to which order Plaintiff refers. In the *City of Tulsa* pleadings, there

exists no document entitled "consent decree." The order resolving the claims at issue in *City of Tulsa* refers to a Settlement Agreement. As a general matter, the Settlement Agreement establishes certain activities that must occur within four years of the Settlement Agreement. The Settlement Agreement requires that the participating defendants fund certain items contained in the Agreement. *See* Case No. 01-CV-0900 EA(C), Docket No. 473. Additionally, the order relating to the Settlement Agreement sets out which of the post-settlement activities are to be made public, which is to occur through reports to the Court by the Special Master and Watershed Management Team. *Id.* at Ex. 1, ¶ D(6), E(5), E(7).

Plaintiff offers no justification for inquiring into confidential records related to a confidential settlement agreement. Such confidential information is not relevant to the claims and issues presented in the present lawsuit under Rule 26. Plaintiff has no need for or ability to discover confidential financial details, which are not even discoverable by the City of Tulsa, as the only relevant information and documents available to the City of Tulsa are whether the settling parties have complied with the order relating to the Settlement Agreement and the reports required of the Special Master. Plaintiff has not offered sufficient justification for invading such a confidential settlement agreement. Thus, this Court should deny Plaintiff's Motion to Compel with respect to Request for Production No. 6.

III. CONCLUSION

WHEREFORE, Cobb-Vantress, Inc. requests that this Court deny Plaintiff's Motion to Compel; for Cobb's attorneys' fees, and for all further relief to which this Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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